Notes

Contempt, Committal and Confusion: *Smith v Kirkegaard* [2024] EWCA Civ 698

Matthew Hoyle*

Committal for contempt; Contempt of court; Costs orders; Enforcement; Rules of court

Abstract

This article discusses the Court of Appeal's decision in Smith v Kirkegaard [2024] EWCA Civ 698, in which the court considered the question of whether a contempt application could be permitted to proceed against a judgment debtor who had failed to pay and taken steps to frustrate enforcement against his assets. It argues that the Court of Appeal was wrong to conclude that a contempt application could not be brought in those circumstances. In reaching this conclusion it was confusing the separate concepts of contempt and of committal and misunderstood the effect of the Debtors Act 1869. This was in part because it failed to consider the new CPR Pt 81 (which governed the application) and erroneously applied the old, repealed rules without properly considering their full context, including the substantive law of contempt. The decision is per incuriam and wrong and should not be followed by future courts considering similar applications.

What is a court to do if a party is ordered to pay a sum of money as costs, but fails to do so, and deliberately frustrates attempts to enforce against assets which could satisfy the debt? Is the judgment debtor in contempt of court, and if so, can anything be done about it? Although the legislation regulating imprisonment for non-payment of debts is over 150 years old, and though CPR Pt 81[1] was recently overhauled with the aim of bringing clarity and simplicity, these matters continue to trouble the appellate courts.

In *Smith v Kirkegaard*,[2] the Court of Appeal held that it was not possible to bring Pt 81 proceedings against a defendant who failed to pay a costs order, despite them having assets from which to do so. This decision was wrong, and the judgment demonstrates that despite the recent reforms aimed at clarifying and simplifying the law of contempt, the law of contempt continues to cause confusion even among the judiciary.

* Barrister, One Essex Court, Email: mhoyle@oeclaw.co.uk.

[1] Titled "Applications and Proceedings in Relation to Contempt of Court".

[2] *Smith v Kirkegaard (aka Engman)* [2024] EWCA Civ 698.

Facts

The underlying dispute concerned two bloggers who, in the Court of Appeal's words "disagreed online". Mr Smith published comments online about Mr Kirkegaard, describing him as a "paedophile". Mr Kirkegaard therefore brought a claim for libel against Mr Smith, providing an address in Denmark in his claim form.

A preliminary issue on single meaning and whether the publications were fact or opinion was tried before Julian Knowles J in 2019. He found the single meaning of each publication was not that Mr Kirkegaard had sexually abused children (as Mr Kirkegaard had pleaded). Instead, he agreed with Mr Smith that their meaning was that Mr Kirkegaard was a supporter of, or apologist for, child sexual abuse, which was a defamatory assertion of opinion rather than fact.[3] As a result, he awarded Mr Smith half of his costs on the preliminary issue, some £13,500.

In light of these findings, given Mr Kirkegaard's previous statements on the subject, it was plain that his action would fail, and he discontinued shortly thereafter. The final cost order in Mr Smith's favour came to some £26,000 (and was endorsed with a penal notice).

Neither costs award was paid. Mr Smith made attempts to enforce these awards, but he alleged that Mr Kirkegaard had taken numerous steps to frustrate enforcement, including changing his address and name. Mr Smith also claimed that Mr Kirkegaard had lied about living in Demark in his claim form, and that he actually lived in the USA at the time. This had wrongly prevented Mr Smith seeking security for costs at the outset.[4]

Mr Smith brought contempt proceedings in June 2023, alleging that Mr Kirkegaard had made false statements in the claim form relating to his address, and failed to pay the costs orders made against him.

Mr Smith was by this time acting in person and made several procedural errors, including failing to seek permission to bring contempt proceedings in respect of a false statement,[5] to swear an affidavit in support of the application and to evidence personal service on Mr Kirkegaard.[6]

As a result, Nicklin J made an unless order requiring the swearing of an affidavit and certification of personal service. Although Mr Smith filed an affidavit, it was not properly sworn, and Nicklin J dismissed the application in October 2023. The following month Nicklin J further refused on the papers an application to restore the contempt proceedings and to permit alternative service, principally on the basis that they were "hopeless", as there was no reliable method of communicating with the defendant such that alternative service could never be authorised. He also held that the court had no jurisdiction over an alleged contemnor outside of England and Wales unless they submitted, and finally that failure to pay a costs order could not "be enforced by contempt proceedings".

Mr Smith appealed, in the interim properly swearing his affidavit. Four issues emerged during his appeal:[7] (1) whether the contempt proceedings were hopeless

[3] *Kirkegaard v Smith* [2019] EWHC 3393 (QB).

[4] Under CPR r.25.13(2)(a) as it then was, no security for costs application could be made on the basis of residence, if that residence was in a Lugano Convention state (including Denmark).

[5] CPR r.81.3(5)(b).

[6] CPR r.81.4(1) and (2)(c).

[7] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [26].

because the court could not be sure they would come to Mr Kirkegaard's attention; (2) whether the court could exercise jurisdiction over Mr Kirkegaard if he was outside of England and had not submitted to the jurisdiction; (3) whether a costs order could be enforced by contempt proceeding and (4) whether Mr Smith should be granted relief from sanctions in respect of the procedural defaults.

As to the first question, the court (Dingemans LJ, with whom Asplin and Bean LLJ agreed) held that alternative service could, at least potentially, be authorised,[8] and there were good reasons to do so given Mr Kirkegaard was evading service while continuing to use social media and the email address on the court file. It was for the first instance court asked to authorise alternative service to decide whether, considering these matters, it was sure that the proceedings had come to Mr Kirkegaard's attention, but it was plainly not "hopeless".[9]

In respect of the second question, it is clear the contempt jurisdiction has extra-territorial effect.[10] As the Court of Appeal held in *Vik v Deutsche Bank*,[11] a foreign national who invokes the court's substantive jurisdiction (like Mr Kirkegaard) submits to its contempt jurisdiction in matters incidental to the claim. As such, the court would have jurisdiction.[12]

In respect of the third question, the court noted Australian authority regarding non-payment of a judgment debt being contempt but held these authorities did not assist Mr Smith in light of the different statutory regime in England. It held that the Debtors Act 1689 barred any enforcement of the costs orders made in Mr Smith's favour,[13] and as such no relief from sanctions could be granted in respect of these alleged grounds of contempt.

Finally, as to relief from sanctions, Nicklin J had not considered this question because of his erroneous conclusions as to service and extra-territoriality.[14] In respect of the allegation that Mr Kirkegaard had signed a false statement of truth, it fell to the court to re-exercise this discretion by reference to the criteria in *Denton*.[15] It considered that while the failure to comply with the unless order was serious, it was mitigated by Mr Smith's attempt to swear an affidavit and prompt application for alternative service.[16] It held that there were good reasons for the failures, which were partly Mr Kirkegaard's fault.[17] Finally, while Mr Smith had failed to properly swear an application, there was a strong public interest in ensuring obedience to court orders and that false statements are not made in statements of case. As such, if Mr Kirkegaard had lied about his address, a committal order might properly be made. It granted relief from sanctions in respect of this allegation and remitted the question of alternative service.[18]

[8] Cf. *Field v Vecchio* [2022] EWHC 1118 (Ch).
[9] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [27]–[32].
[10] *Dar Al Arkan Real Estate Development Co v Al Refai* [2014] EWCA Civ 715; [2014] 1 C.L.C. 855 at [43].
[11] *Vik v Deutsche Bank AG* [2018] EWCA Civ 2011; [2019] 1 W.L.R. 1737 at [55].
[12] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [33]–[35].
[13] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [44].
[14] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [47].
[15] *Denton v TH White Ltd* [2014] 1 W.L.R. 3926; [2014] C.P. Rep. 40 CA.
[16] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [48].
[17] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [49].
[18] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [54].

Comment

The first and second questions on appeal were dealt with quite shortly and the court's conclusions are clearly correct. Its decision on relief from sanctions also followed inevitably from the first three answers. However, its answer to the third question involves both a manifest legal error and more complicated terminological and conceptual difficulties, which a future court ought to clarify.

Worryingly, Dingemans LJ[19] starts his analysis by quoting from "CPR r81.4". His quotation suggests that any enforcement of a judgment or order is done "subject to the Debtors Acts … by an order for committal". This quotation appears to come from *Hussein v Vaswani*[20] (a decision which Dingemans LJ later refers to expressly in his judgement[21]). However, *Vaswani* (a) involved the old CPR r.81.4, repealed in October 2020, and the new CPR Pt 81 has no equivalent wording; and (b) concerned the provisions on committal only,[22] and did not touch upon the separate provisions in that Part relating to fines or to sequestration.[23] The Court of Appeal's decision proceeded on the wrong statutory footing. It is plainly in error, and this error flows into the rest of the reasoning.

A party making an application under the new, simplified, Pt 81 ("Applications and Proceedings in Relation to Contempt of Court"), is in all cases making a "contempt application", an application "for an order determining contempt proceedings",[24] which are "proceedings for contempt of court".[25] It is to be noted that the current Pt 81 (rightly) eschews the phrase "committal proceedings" or "committal applications", although this language is still prevalent in recent decisions, likely because this was used in one part of the old Pt 81, pre-October 2020,[26] which recognised different types of applications for different sanctions.

Although the Civil Procedure Rule Committee did not expressly state it in its consultation on the October 2020 amendments,[27] this simplification sits better with the substantive law of contempt (and it is clear that neither the old nor new Pt 81 change the substantive law[28]).

The concepts of "contempt" and "committal" are not synonymous. The word "committal" (and as explained in CPR r.81.2, an "order of committal") refers only to the process of a natural person being imprisoned as a result of their contempt.[29] As such, while they can commit and be punished for contempt,[30] a corporate person

[19] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [38].
[20] *Hussein v Vaswani* [2020] EWCA Civ 1216 at [19].
[21] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [39].
[22] CPR Pt 81 (pre-October 2020) s.2.
[23] See CPR Pt 81 (pre-October 2020) rr.81.1(2) and 81.20.
[24] CPR r.81.2.
[25] CPR r.81.1(1).
[26] CPR r.81.10 (pre-October 2020). This appears to have carried over from RSC Ord.52, which did not refer to either a "committal application" or "contempt application" generically, but in rr.1 and 9 envisioned separate applications in respect of committal and "other" punishment for contempt.
[27] Civil Procedure Rule Committee, "Proposed rule chages relateing to contempt of court; redraft of CPR Part 81" (2020), *https://consult.justice.gov.uk/digital-communications/rule-changes-relating-contempt-of-court-cpr-81/supporting_documents/cprcrule8.1consultation.pdf*.
[28] CPR Pt 81 (pre-October 2020) r.81.2(1); CPR r.81.1(2)–(3).
[29] Traditionally, English law distinguished between committal for taking steps which have been prohibited and attachment for failure to take steps that have been ordered: *Re Evans* [1893] 1 Ch 252 CA. Since 1965, the rules have provided for imprisonment for either type of conduct to be called "committal": Arlidge, *Eady and Smith on Contempt* 5th edn (London: Sweet & Maxewell, 2019), para.15-5.
[30] *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 A.C. 456; [1994] 3 W.L.R. 1249 HL.

cannot be committed and cannot be subject to a committal order.[31] It would make no sense to refer to a "committal application" or "committal proceedings" in such a case (which is why the old Pt 81 had to have separate provisions for applications for fines and sequestration).

This distinction tracks through to CPR r.81.9(1), which provides that "[i]f the court finds the defendant in contempt of court, the court may impose a period of imprisonment (an order of committal), a fine, confiscation of assets or other punishment permitted under the law". It recognises a difference between the determination that a defendant has acted unlawfully (i.e. is in contempt) and the type of punishment which may be ordered as a result. In other words, it is the difference between a determination of whether the defendant is in breach of a substantive legal duty (whether found in a general rule or in a specific court order) and how the court responds to that breach.

This distinction is critically important in the context of the Debtors Act 1869. The effect of the Act is to remove the power of the court to punish a contempt by committal in some (but not all[32]) circumstances where it had previously been available. This is clear from the language of s.4 of the 1869 Act, which provides (so far as is relevant):

> "Abolition of imprisonment for debt, with exceptions.
>
> With the exceptions herein-after mention, no person shall be arrested or imprisoned for making default in payment of a sum of money…
>
> Provided … that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money."

Section 4 is therefore aimed at the judicial response, i.e. the power to impose a type of punishment, and not the substantive legal duty or the wrong arising from its breach. Though this is apparent just from the opening text, the final proviso states this in terms. As the Court of Appeal noted,[33] Halsbury's Laws of England makes clear that a default in payment "cannot be punished by committal … [it] remains a contempt".[34] It therefore (correctly) held that "failure to pay the costs may be a contempt of court, but it cannot be enforced by imprisonment for contempt".[35]

Despite this analysis, the Court of Appeal then failed to consider whether the unavailability of *committal* precluded all "contempt proceedings" under Pt 81, as Nicklin J had held. This was probably inevitable because of Dingemans LJ's erroneous reference to one part of the old r.81.4, which (when read out of the relevant context) suggested that any application to enforce a judgment under Pt 81 amounted to seeking an "order for committal". That feeds into the terminological error in the court's ultimate conclusion,[36] where it states that "the judge was right to conclude that the failure to pay costs could not be enforced by committal

[31] *R. v JG Hammond & Co Ltd* [1914] 2 K.B. 866 KBD; *R. v Poplar MBC Ex p. London CC (No.2)* [1922] 1 K.B. 95 CA at 110; *Masri v Consolidated Contractors International Co SAL* [2011] EWCA Civ 898; [2012] 1 W.L.R. 223 at [7].

[32] Section 4(1)–(6) and s.5 of the Debtors Act 1869 (as amended).

[33] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [43].

[34] Halsbury's Laws of England (2019) 24 S.3, Civil Contempt, Pt 5.

[35] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [44].

[36] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [44].

proceedings in this case". The court does not acknowledge that Nicklin J's impugned conclusion[37] was in fact that "a failure to pay costs orders could not be pursued by *contempt* proceedings" (emphasis added).

The conflation of terminology is confirmed when the court then[38] slips back into saying that "The judge was right to find that non-payment of costs proceedings could not be enforced by a committal for contempt". Again, this is correct in principle, but it is not what the judge decided, and it is not a reason for dismissing the appeal on this point.

If the court were correct in aligning "contempt" and "committal" proceedings, it would lead to a peculiar anomaly in its reasoning. It noted, seemingly with approval, that "some courts have exercised a discretion not to permit a party in default to take any further part in proceedings, but that does not arise in this case".[39] However, the Court of Appeal has previously held that it is not appropriate to exercise this discretion without the safeguards in what is now Pt 81 being complied with.[40] If *Kirkegaard* is correct, then it is never possible for the court to refuse to hear a party who has not complied with orders for payment of money. This result would effectively overrule the two long-standing authorities cited for this proposition in Halsbury's Laws.[41]

Ultimately, the correct position is that Debtors Act 1869 does not prevent contempt proceedings under Pt 81 in respect of judgment debts (provided the order provided for payment within a certain period of time[42] and included a penal notice[43]). The 1869 Act simply prevents a party from seeking (and the court imposing) a committal order if contempt is proved.

It may be that the court's confusion arose in part because Mr Smith expressly sought to commit Mr Kirkegaard (although this is not clear from the factual summary). However, unlike under the old Pt 81, there is now no procedural distinction between forms of contempt application (and there was never a substantive difference in the law of contempt). Thus, while an applicant may ask for a particular sanction in respect of civil contempt,[44] the sanction imposed is ultimately in the discretion of the court[45] (subject to the limits in the Debtors Act 1869 and elsewhere). If an applicant (especially an unrepresented litigant like Mr Smith) has 'over-egged the pudding' by asking for committal where it is not possible, that should not allow the defendant to escape punishment for their wrongdoing on a technicality. Many contempts are sufficiently trivial that they are never capable of attracting a committal order,[46] but it has never been the court's practice to dismiss each and every application asking for committal on that ground.

[37] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [22] and [36].
[38] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [46].
[39] *Smith v Kirkegaard* [2024] EWCA Civ 698 at [44].
[40] *Federal Bank of the Middle East v Hadkinson (Stay of Action)* [2000] 1 W.L.R. 1695 at 1711–1712; [2000] B.P.I.R. 597.
[41] *Leavis v Leavis* [1921] P.299 and *Gower v Gower* [1938] P.106.
[42] Traditionally, most money orders at common law were not technically capable of being breached as they were given in the form that "[the claimant] do recover £X" and, unlike orders for payment in equity, did not include a time limit: *Re Oddy* [1906] 1 Ch.93 CA; *Hulbert & Crowe v Cathcart* [1894] 1 Q.B. 244 (QBD). This has been overtaken by CPR r.40.11, which provides for a time limit by default for money judgments.
[43] CPR r.81.4(e), although this is a formality which the court may dispense with: *Business Mortgage Finance 4 Plc v Hussain* [2022] EWHC 449 (Ch) at [49].
[44] *Business Mortgage Finance 4 Plc v Hussain* [2022] EWCA Civ 1264; [2023] 1 W.L.R. 396 at [131].
[45] *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524; [2019] 4 W.L.R. 65 at [37]; *Arlidge, Eady and Smith on Contempt* (2019), para.14-1.
[46] *Pirtek (UK) Ltd v Jackson* [2018] EWHC 1004 (QB) at [52], that imprisonment is a "last resort".

Regardless of how the confusion arose, it is respectfully submitted that the Court of Appeal clearly fell into error in refusing to grant relief from sanctions in respect of the non-payment of debts. It should have permitted Mr Smith to bring contempt proceedings for non-payment of the costs orders, particularly given Mr Kirkegaard's campaign to frustrate those orders. Although Mr Kirkegaard could not have been imprisoned for non-payment, as made clear by CPR r.81.9 other punishments are available. The court could have made an order that any of his assets which might be found be sequestered to coerce compliance,[47] or imposed a fine. Moreover, a finding of contempt is in itself a weighty matter,[48] whether or not the punishment will in practice ever bite upon the contemnor.[49]

Conclusion

The Court of Appeal appears to have firmly ruled that no application can be made under Pt 81 in respect of non-payment of judgment debts (at least, unless it falls within an exception to s.4 of the Debtors Act 1869). If this decision stands, judgment creditors have lost a potentially powerful tool to compel debtors with the ability to pay[50] to meet their obligations.

However, given that it referred to the wrong version of Pt 81, while stating that the statutory context was the key differentiation from the Australian authorities which permitted contempt applications in these circumstances, this decision is plainly *per incuriam*. This, combined with a misunderstanding of the effect of the Debtors Act 1869, led the Court of Appeal into error in this case. Given Mr Smith was acting in person, that may be entirely understandable (although very unfortaunte). However, a future court concerned with an application under Pt 81 in similar circumstances should apply the current version of the rules and should not follow this decision as it would other decisions of the Court of Appeal.[51]

[47] E.g. *OCM Maritime Nile LLC v Courage Shipping Co* [2024] EWHC 1226 (Comm) at [154]–[157].
[48] *R. (on the application of Bempoa) v Southwark LBC* [2002] EWHC 153 (Admin); [2002] N.P.C. 23.
[49] *VIS Trading Co Ltd v Nazarov* [2015] EWHC 3327 (QB); [2016] 4 W.L.R. 1 at [58].
[50] A debtor who genuinely cannot pay will not be in contempt. The debtor must prove to the criminal standard compliance was not impossible: *Perkier Foods v Health Foods* [2019] EWHC 3462 (QB) at [14]–[15].
[51] *Dar Al Arkan Real Estate Development Co v Al-Refai* [2013] EWHC 4112 (QB); [2014] 1 C.L.C. 813 suggests that only the Court of Appeal can decline to follow its earlier decision where a relevant *case* has been overlooked. However, where a relevant statute has been overlooked, the High Court should simply apply that statute as a matter of constitutional principle.